ILE COPY

No. 957 101

Office-Supreme Court, U.S.
FILED
MAY 26 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1960

KARL L. PEDERSEN,

Libelant,

—against—

Tanker BULKLUBE, her engines, etc.,

Respondent,

TODD SHIPYARDS CORP.,

Respondent-Impleaded.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KARL L. PEDERSON, *Petitioner*

By ARTHUR K. ASH
Proctor for Petitioner
15 Park Row
New York, N. Y.

HERBERT LEBOVICI
JACK STEINMAN
On Petition

Dated: New York, N. Y.
May, 1960

INDEX

PAGE

Jurisdiction 2

Questions Presented 2

Statement of the Case 2

Reasons for Granting the Writ 5

Conclusion 11

Appendix A—Opinion of Court of Appeals 13

Appendix B—Judgment of Court of Appeals 15

Table of Cases

Alaska S.S. Co. v. Petterson, 347 U. S. 396 11
Anaces, The, 93 Fed. 240 ..... 5, 8
Anglo Patagonian, The, 253 Fed. 92 10
Ark, The, 17 Fed. 2d 446 9

Barnstable, The, 181 U. S. 464 5
Brig Malek Adhel, The, 43 U. S. 210 5

China, The, 7 Wall. 53 ..... 5, 6
Crumady v. Fisser, 358 U. S. 423 6
C. H. Northam, The, 181 Fed. 983 9

Desper v. Starved Rock Ferry, 342 U. S. 187 11

Eastern S.S. Corp. v. Great Lakes Dredge & Dock Co., 256 Fed. 497 9

Grant Smith Porter Co. v. Rohde, 257 U. S. 469 8
Grillea v. U. S., 232 Fed. 2nd 919 6

PAGE

Hercules v. The Brigadier General Absolom Baird, 214 Fed. 2d 66 9

John G. Stevens, The, 170 U. S. 113 ..... 5, 8

Kate Cann, The, 2 Fed. 241, aff'd 8 Fed. 719 ..... 5, 8

North Pacific S.S. Co. v. Hall Bros. Co., 249 U. S 119 8, 9

Owyhee, The, 60 Fed. 2d 641 10

Plymouth, The, 70 U. S. 20 8

Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U. S. 124 8

Seas Shipping Co. v. Sieracki, 328 U. S. 85 10

Turner v. U. S., 27 Fed. 2nd 134 ..... 6, 7

TEXTS

The Common Law (Justice Holmes) 6

STATUTES

Title 1 U. S. C. A. 3 9

Title 28 U. S. C. A. 1254(1) 2

Title 46 U. S. C. A. 688 11

Supreme Court of the United States

OCTOBER TERM, 1960

KARL L. PEDERSEN,

Libelant,

—against—

Tanker BULKLUBE, her engines, etc.,

Respondent,

TODD SHIPYARDS CORP.,

Respondent-Impleaded.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Karl L. Pedersen, prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, filed February 26, 1960, affirming a final decree entered in the United States District Court for the Eastern District of New York, on the 23rd day of March, 1959, upon the opinion of Zavatt, *D.J.*, which opinion also constituted the District Court's Findings of Fact and Conclusions of Law.

The opinion of the Court of Appeals, Appendix A of this petition, is not yet officially reported. The opinion of the District Court by Zavatt, *D.J.*, dismissing the libel and dismissing the impleading petition without prejudice, is

set forth in full on pages 48a through 57a of the appendix for the libellant-appellant in the Court below, and is reported at 190 F. Supp. 462.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. C. A., Section 1254 (1). The judgment of the Court of Appeals affirming the decree dismissing the libel was entered on February 26, 1960, the appeal having been argued on the 4th day of February 1960. Said judgment is contained in Appendix B hereof.

Questions Presented

1. Does the per curiam opinion of the Court below affirming the decision of the District Court, conflict with Maritime Law principles long applied by this Court imposing liability *in rem* for torts committed aboard vessels in navigable waters?

2. Whether a business invitee, properly aboard a vessel in navigable waters, is entitled to recover against the vessel *in rem* where his injuries "were caused solely by the negligence of Todd (52a),* the respondent-impleaded shipyard which was lawfully in possession of the vessel.

3. Did the Courts below erroneously hold that no maritime lien could arise merely because the vessel was ". . . temporarily withdrawn from navigation"?

Statement of the Case

This is an action *in rem* for damages for personal injuries sustained by a business invitee while working aboard

---

* References are to pages of libellant's appendix in the Court below.

the Tanker BULKLUBE in navigable waters on August 8, 1952. Jurisdiction was obtained pursuant to process *in rem* under which the vessel was arrested. Subsequently, stipulations for value and costs, and a claim of owner were filed, and thereafter a motion to implead the shipyard was granted.

At the outset, we point out that the facts herein are undisputed, and may be taken from the findings of the District Court.

Briefly stated, the vessel BULKLUBE was delivered to Todd on June 22, 1952 for certain "rather extensive repairs" and was returned to its owner on December 19, 1952 (48a). In this regard we point out that the BULKLUBE was described by the District Court, notwithstanding the extensive work to its interior, in the following terms (50a):

> "However, the shell of the vessel, those members of the vessel corresponding to the keel, including the keelson, and the external structures of the vessel above the main deck, such as the bridge house, the bridge, and the after structures, were substantially undisturbed."

The vessel then entered upon the "further performance" of a charter party which had been in effect when the vessel was delivered to Todd on June 22, 1952 (51a). On December 19, 1952 the vessel sailed from New York to Texas City to load a cargo of petroleum. The District Judge found, *inter alia*, that the vessel had been "temporarily withdrawn from navigation" (57a).

The accident herein occurred on August 8, 1952.

The District Court expressly found "that the injuries to Pedersen were caused solely by the negligence of Todd in failing to properly construct the staging upon which Pedersen was required to perform his work" (52a).

Furthermore it was stipulated that Pedersen had taken no part in the constructing of the staging (51a).

There is no dispute but that at the time of this negligence the vessel was in the lawful possession of Todd, the vessel having been delivered pursuant to a contract between the shipowner and Todd (47a, 48a, 49a).

During the course of the repair work it had become necessary that the libellant climb upon a staging in one of the tanks of the BULKLUBE. The staging upon which he stood consisted of a single plank some 12 feet long, 12 inches wide, and 2 inches thick, which rested at either end upon a metal bracket welded to the wall of the tank. There were no angle irons to support the brackets of the staging. As Pedersen stood on the after end of the plank and a coworker upon its forward end, the bracket supporting the forward end collapsed and Pedersen was thrown and fell to the bottom of the tank (50a-51a).

The staging had been approximately 40 to 50 feet from the bottom of the tank, and the injuries sustained exceedingly serious (50a).

The District Court in deciding the factual issues presented found that the shipowner exercised no control over the methods of work employed by Todd in the performance of its contract, and would not have been liable *in personam*.

Without citing controlling authority, the District Court rejected libellant's main contention that the vessel was liable to him *in rem* for the tort of anyone who was in lawful possession of the vessel. Its decision in this respect is predicated upon the assumption that a vessel temporarily withdrawn from navigation is not the proper subject of a maritime lien, although it also argued that the lack of a right over against the tort feasor prevented any such lien from arising.

In so doing, the Court below failed to properly recognize well established authority in this Court such as *The China*, 7 Wall. 53, *The John G. Stevens*, 170 U. S. 113, *The Brig Malek Adhel*, 43 U. S. 210, and *The Barnstable*, 181 U. S. 464, which establish that a vessel is liable *in rem* for the tort of anyone who is in lawful possession of her. The Court below further failed to recognize that a maritime lien attaches to a vessel irrespective of the fact of its temporary withdrawal from navigation. The Court below erroneously assumed that no maritime lien could attach unless the vessel was actually actively engaged in navigation as an instrument of commerce.

In brief, the Court below failed to apply settled principles of *in rem* liability established by this Court and various Courts of Appeals of other circuits, which clearly impose liability *in rem* where an injury occurs aboard a vessel through the negligence of anyone lawfully in possession of her, regardless of whether the vessel is actually engaged at the moment as a moving entity in active commerce.

Reasons for Granting the Writ

The questions presented are important as affecting the rights and liabilities of many people in a far-flung industry which is affected with the public interest.

The decision below narrows and constricts applicable decisions of this Honorable Court, such as *The China*, and *The Barnstable, supra*, and conflicts with them in principle.

The decision below conflicts with time-honored decisions in courts of this and other circuits, such as *The Anaces*, 93 Fed. 240, *The Kate Cann*, 2 Fed. 241, affirmed 8 Fed.

719, and *Turner* v. *U. S.*, 27 Fed. 2d 134. The decision below is also inconsistent with an earlier decision in the same circuit, to wit, *Grillea* v. *U. S.*, 232 Fed. 2d 919, which has been approved by this Honorable Court in *Crumady* v. *Fisser*, 358 U. S. 423.

Uniformity in this particular field of law is especially required and necessitates a current controlling decision by this Honorable Court.

As recently as the case of *Grillea* v. *The United States*, *supra*, decided in 1956 by the Court of Appeals for the Second Circuit, it was said that a maritime lien can be imposed upon a ship for a claim on which no jural person is liable *in personam*. The Court went on to state that it saw no reason why a person's property should never be liable unless he or someone is liable *in personam*.

Apart from the question of whether or not there may be any other jural person liable *in personam*, the law as laid down by this Court is crystal clear that a maritime lien can be imposed upon a ship where the owner is completely without fault, and the instances of such liability are numerous.

A classic example is that of *The China*, *supra*, wherein a vessel was held liable *in rem* for the negligence of a compulsory pilot.

Justice Holmes in his famous work "The Common Law" says (at pages 26 and 27):

> "It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and as that supposition they at once become consistent and logical.

By way of seeing what those peculiarities are, take first, a case of collision at sea. A collision takes place between two vessels, the Ticonderoga and the Melampus, through the fault of the Ticonderoga alone. That ship is under a lease at the time, the leasee has his own master in charge, and the owner of the vessel has no manner of control over it. The owner, therefore, is not to blame, and he cannot be charged on the ground that the damage was done by his servants. *He is free from personal liability on elementary principles. Yet it is perfectly settled that there is a lien on his vessel for the amount of the damage done* (case cited), and this means that the vessel may be arrested and sold to pay the loss in any admiralty court whose process will reach her." (Italics added.)

We have demonstrated above that a shipowner's freedom from personal liability does not negate liability of the vessel *in rem* for tort claims, personal injury or other variety.

Nor, as the Court below supposed, does the existence of such liability *in rem* rest upon the ability of the innocent shipowner, whose vessel is so liable, to obtain indemnity or recovery over. In this connection we cite the case of *Turner* v. *The United States*, 27 Fed. 2d 134, where the Court stated at page 136:

"The offending ship is considered as herself the wrongdoer and as herself bound to make compensation for the wrongdoing. The owner of the injured vessel is entitled to proceed against the offender without regard to the question who may be her owners, or to the division, the nature or extent of their interests in her. With the relations of the owners of those interests, as among themselves, the owner of the injured vessel has no concern."

See also *The Kate Cann, supra.*

So here the libellant has no concern with any right over, or the lack of same which the shipowner may or may not have.

Although not relevant for present considerations, Todd could in fact well be liable if its negligence created a liability on the part of the vessel. See *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U. S. 124.

It must be remembered in the case at bar that the District Court found that the injuries were caused solely by the negligence of Todd and it must be further remembered that Todd was in lawful possession of the vessel which it obtained pursuant to a contract with the shipowner.

Thus is presented the situation of a wrong done aboard a vessel in the lawful possession of one whom the shipowner had put in possession. The Court below and respondents urge that no lien can be imposed for this tort since the vessel had been "temporarily withdrawn from navigation." The law simply does not sustain such position.

The settled rule of law is that the jurisdiction of the admiralty in matters of tort depends on the locality of the tort—whether the wrong was committed upon a vessel in navigable waters.

See:

The Plymouth, 70 U. S. 20;
North Pacific S.S. Co. v. Hall Bros. Co., 249 U. S. 119;
Grant Smith Porter Co. v. Rohde, 257 U. S. 469.

Such wrongs give rise to maritime liens.

See:

The John G. Stevens, supra;
The Anaces, supra.

The District Court's opinion here affirmed by the *per curiam* decision below, for the first time superimposes as an additional requirement of tort jurisdiction in admiralty, that the vessel must be in active navigation. No authority is given or found for such variation from established requirements.

It is only in cases involving maritime liens *ex contractu* that the concept of a vessel in actual navigation has been of significance. However, even in such cases, maritime liens have been imposed on vessels once committed to navigation but not actively engaged therein even extending to the following: a vessel in the process of being dismantled to be taken out of navigation (*The C. H. Northam*, 181 Fed. 983); a sunken drillboat (*Eastern S.S. Corp.* v. *Great Lakes Dredge & Dock Co.*, 256 Fed. 497); a floating dance hall, described in the opinion as, approaching the position of a ship temporarily withdrawn from commerce and moored to a dock (*The Ark*, 17 Fed. 2d 446); and last, a vessel under repair in a shipyard as in the case at bar (*Hercules Co.* v. *The Brigadier General Absolom Baird*, 214 Fed. 2d 66). See also Title 1 U. S. C. A. 3.

This Honorable Court itself has rejected the application of the "dead ship" theory in lien cases where the facts were much more susceptible of such application than here. In *North Pacific S.S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119, this Court affirmed the assertion of a maritime lien on a vessel moored at a dock and in need of very extensive repairs. The vessel had been wrecked and submerged for a long time. Ice floes had torn away her upper decks and even bottom plates required replacement. She was under charter for a voyage to be commenced as soon as the necessary repairs were done. Yet, *sub judice* not only were the ship's shell, keel and external structures essentially undisturbed, as found by the District Court, but the vessel actually sailed after the repairs upon the further performance of a charter

party already in existence when the vessel was taken to the drydock after performing the initial services under the charter.

If we look to such cases as above cited and such as the *Ouyhee*, 60 Fed. 2d 641, certainly there would be a lien for the unpaid balance of the agreed price of repairs upon a vessel being "rebuilt" to the same extent as the vessel here. If a libel *in rem* would be created *ex contractu* no reason is perceived why a libel *in rem* should not be created in favor of one who receives personal injuries in the course of performing the work contracted for. See *The Anglo-Patagonian*, 235 Fed. 92 at p. 94. Thus even assuming, *arguendo* that the question of whether a lien for a tort arises is governed by the same considerations as would govern a lien *ex contractu*, it is seen that a lien *ex contractu* would arise here.

However, liens for torts may arise under circumstances beyond where liens *ex contractu* might not arise. In ultimate, *in rem* liability is a species of limited liability without fault: liability limited to the value of the vessel. In the Maritime Law, unlimited liability without fault is too well recognized to make further mention ever since the case of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85.

There is no dispute but that the vessel was in navigable waters at the time of the occurrence, no dispute that it was under charter at the time of the repairs, and that at the completion thereof it entered upon the further performance of the charter party, and sailed to load a petroleum cargo when the repairs were done. Thus this vessel was, *a fortiori*, subject to a maritime lien when one considers that maritime liens have been applied even to dismantled vessels and sunken vessels.

Finally, no question is raised anywhere, nor, indeed, can a question be raised as to whether or not the staging was

properly part of the vessel. In this connection we cite *Alaska S.S. Co.* v. *Petterson*, 347 U. S. 396, and *Lawlor* v. *Bethlehem Steel Company* (not yet officially reported), decided by the Court of Appeals for the Second Circuit on March 8, 1960, where a ladder was considered part of the vessel.

Upon all the foregoing authorities, it is clear that the principle is anciently and firmly woven into our law that a vessel is liable *in rem* for the tort of anyone in lawful possession thereof in navigable waters. It is equally clear that a temporary hiatus in its active service does not so change the character of a vessel as to deprive it of its attribute as the subject of such lien. Such notions of "withdrawal" from navigation as may be pertinent in such cases as *Desper* v. *Starved Rock Ferry*, 342 U. S. 187, to determine who may be a seaman for purposes of the Jones Act, Title 46 U. S. C. A. are not here pertinent. Even the cases of liens *ex contractu* above referred to have recognized that such liens arise on vessels "temporarily withdrawn" from navigation. Since tort liability *in rem* rests on the test of locality, *a fortiori*, tort liens arise in such circumstances.

CONCLUSION

A matter of general and substantial importance governed by Federal Law is presented herein on the basis of the authorities above set forth. The decision of the Court below appears to be in conflict not only with other decisions in the same Court, but in conflict with decisions of other District Courts and Courts of Appeals for other Circuits, and most important, in conflict, on principle at least, with decisions of this Honorable Court.

WHEREFORE, inasmuch as the decision below is so clearly erroneous as to make argument unnecessary before this Honorable Court, petitioner respectfully prays that a *writ of certiorari* be granted and that this Court reverse the Court below with instructions to remand the case to the District Court for the entry of a decree in petitioner's favor and for such further proceedings as may be required to assess damages, or any other relief as to the Court may seem just and proper.

Respectfully submitted,

KARL L. PEDERSON, *Petitioner*

By ARTHUR K. ASH
Proctor for Petitioner

Dated: New York, N. Y.
May, 1960

HERBERT LEBOVICI
JACK STEINMAN
On Petition

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 179—October Term, 1959.

(Argued February 4, 1960 Decided February 26, 1960.)

Docket No. 25714

KARL L. PEDERSEN,

Libellant-Appellant,

—against—

THE TANKER BULKLUBE, her engine, tackle, appurtenances, etc.,

Claimant-Respondent-Appellee,

—and—

TODD SHIPYARDS CORPORATION,

Respondent-Impleaded-Appellee.

Before:

MEDINA and WATERMAN, *Circuit Judges*, and MADDEN, *Judge*, United States Court of Claims.*

Appeal from a final decree of the United States District Court for the Eastern District of New York, in Admiralty. Joseph C. Zavatt, *Judge.*

* Sitting by designation.

Libellant appeals from a decree dismissing his libel. Opinion below reported at 170 F. Supp. 462. *Affirmed.*

HERBERT LEBOVICI, New York, N. Y. (Lebovici & Safir, New York, N. Y., on the brief), *for libellant-appellant.*

VICTOR S. CICHANOWICZ, New York, N. Y. (Paul M. Jones and Cichanowicz & Callan, New York, N. Y., on the brief), *for claimant-appellee.*

PATRICK E. GIBBONS, New York, N. Y. (Galli, Terhune, Gibbons & Mulvehill, New York, N. Y., on the brief), *for impleaded-respondent.*

PER CURIAM:

The decree is affirmed on the opinion of Judge Zavatt, 170 F. Supp. 462.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of February one thousand nine hundred and sixty.

Present:

HON. J. WARREN MADDEN,
Judge, U. S. Court of Claims.
HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

KARL L. PEDERSEN,
Libelant-Appellant,

—v.—

THE TANKER "BULKLUBE," her engines, tackle, appurtenances, etc.,
Respondent-Appellee,

—and—

TODD SHIPYARDS CORPORATION,
Respondent-Impleaded-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed, with costs to the appellees.

A. DANIEL FUSARO
Clerk

LE COPY
457
101

Office-Supreme Court, U.S.
FILED
JUN 14
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1960

KARL L. PEDERSEN,

Libelant,

against

TANKER BULKLUBE, her engines, etc.,

Respondent,

TODD SHIPYARDS CORP.,

Respondent-Impleaded.

BRIEF OF RESPONDENT-IMPLEADED, IN OPPOSITION TO LIBELANT'S PETITION FOR WRIT OF CERTIORARI

INDEX

	PAGE
OPINIONS BELOW	1
STATEMENT	1
THE QUESTION PRESENTED	2
ARGUMENT	3
CONCLUSION	7

CASES CITED

The Barnstable, 181 U. S. 464	3
Berge v. National Bulk Carriers, 148 F. Supp. 608	2
The Blackheath, 195 U. S. 361	4
The China, 7 Wall. 53	5, 6
The Eugene F. Moran, 212 U. S. 466	3
Grillea v. United States, 232 F. 2d 919	5, 6
Latus v. United States of America and Todd Shipyards Corp., 2d Cir., decided April 11, 1960, not yet officially reported	5
The Osceola, 189 U. S. 158	6
Packing Co. v. Sandanger, 259 U. S. 255	6
The Resolute, 168 U. S. 437	3
Samuels v. Munson S.S. Line, 63 F. 2d 861	6
Smith v. The Mormacdale, 198 F. 2d 849 (certiorari denied, 345 U. S. 908)	6
West v. United States, 361 U. S. 118	2

Supreme Court of the United States

OCTOBER TERM, 1960

KARL L. PEDERSEN,

Libelant,

against

TANKER BULKLUBE, her engines, etc.,

Respondent,

TODD SHIPYARDS CORP.,

Respondent-Impleaded.

BRIEF OF RESPONDENT-IMPLEADED, IN OPPOSITION TO LIBELANT'S PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the United States District Court for the Southern District of New York is officially reported in 170 F. Supp. 462. The opinion of the Court of Appeals for the Second Circuit, affirming the District Court, is reported at 274 F. 2d 824.

Statement

The libelant, a rigger employed by Todd Shipyards, was injured on August 8, 1952, aboard the S.S. Bulklube, when a staging on which he was standing collapsed and precipitated him into a tank.

The vessel was then in Todd Shipyards undergoing extensive repairs, amounting to a virtual rebuilding of its

interior, pursuant to a contract between its owner and the Todd Shipyards Corporation. It was under the exclusive control of Todd and all of the work was being done by Todd's employees under the supervision and direction of Todd's supervisory personnel.

The ship was not in navigation. It had no crew aboard. The only contact its owner had with it during the time repairs were being made was through two inspectors whose function it was to see that the repairs when completed conformed to the contract specifications.

In a prior action by another rigger who was injured aboard the same vessel during the course of the repairs under the same contract, it was held that the injured workman could not recover for a breach of the warranty of seaworthiness because the vessel, in its then status, owed a warranty of seaworthiness to no one; and it was further held that the owner was not liable in negligence because it was not in control of the vessel. (*Berge* v. *National Bulk Carriers*, 148 F. Supp. 608, affirmed 251 F. 2d 717, certiorari denied, 356 U. S. 958.) The subsequent decision by this court in *West* v. *United States*, 361 U. S. 118, confirmed the correctness of that holding.

To avoid the impact of those decisions, the libelant sued *in rem*, claiming a lien on the vessel for the injuries which he suffered aboard her. His contention has been rejected by the District Court and by the Court of Appeals for the Second Circuit.

The Question Presented

1. Whether a maritime lien arises under general admiralty law in favor of a shore-based worker, who is injured on board a vessel which is not in active navigation, where the status of the vessel is such that her seaworthiness is not warranted by her owner and where the owner, being out of control, is not liable to the injured workman in negligence.

ARGUMENT

The S.S. Bulklube was not in maritime service. She was in the Todd's drydock undergoing extensive repairs for the purpose of making her seaworthy. In that status, she owned a warranty of seaworthiness to no one. Further, the libelant's injuries were not caused by her as a moving agent. No maritime lien or privilege, therefore, accrued in favor of the libelant as a result of his injury on board her.

A suit *in rem* in admiralty is a proceeding to give effect to a maritime lien and the existence of the lien must be established if the proceeding is to be sustained. (*The Resolute*, 168 U. S. 437, 42 L. ed. 533, 18 Sup. Ct. Rep. 112.) Such direct action against the vessel itself, for damages resulting from its torts is founded on the fiction that the vessel is an independent juristic person, capable of inflicting injury through its own unseaworthiness or through the actions of its agents or personnel. The ship itself is regarded as the offender and "is to be treated in some sense as a principal, and as personally liable for the negligence of anyone who is lawfully in possession of her, whether as owner or charterer." (*The Barnstable*, 181 U. S. 464, 467.)

The lien attaches only in cases where the ship is the offender, "the noxious instrumentality", not a mere passive instrument of the harm. (*The Eugene F. Moran*, 212 U. S. 466, 474.) In that case, the opinion points out:

> "No doubt the fiction that a vessel may be a wrongdoer and may be held, although the owners are not personally responsible, on principles of agency or otherwise, is carried further here than in England. • • • Possibly the survival of the fiction has been helped by the convenient security that it furnishes, just as no doubt the responsibility of a master for a servant's torts that he has done his best to prevent has been

> helped by the feeling that it was desirable to have someone who is able to pay. * * * But, after all, a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be extended. There is a practical line and a difference in degree between the case where the harm is done by the mismanagement of the offending vessel and that where it is done by the mismanagement of another vessel to which the immediate but innocent instrument of harm is attached."

The distinction was noted by Mr. Justice Holmes in his decision in *The Blackheath*, 195 U. S. 361, 366:

> "What the early law seems most to have looked to as fixing the liability of the ship was the motion of the vessel, which was treated as giving it the character of a responsible cause. * * * The responsibility of the moving cause took the form of deodand when it occasioned death, like the steam engine in *Queen* v. *Eastern Counties R. Co.*, 10 Mees. & W. 59, and innumerable early instances, but it was not confined to such cases. * * * The principal has remained until the present day. *United States* v. *The Malek Adhel*, 2 How. 210, 234, 11 L. ed. 239, 249; *The China*, 7 Wall. 53, 19 L. ed. 67."

Though there may be differences of opinion in the decided cases as to other aspects of maritime liens, there seems to be unanimous agreement that, apart from liens created by statute, maritime liens are imposed upon the vessel in cases of tort only when the vessel itself is the offending instrumentality, either through its unseaworthiness, which here is irrelevant, or through its motion or mismanagement by its personnel. Every consideration which led to the recognition of liens and their permanent establishment in the general admiralty law supports that conclusion. There is a sound basis in reason from impos-

ing a lien on a vessel where a contract made for its benefit has been breached or where damage has been caused through its instrumentality. But there is no reasonable basis for imposing liability on the vessel for damages which she did not cause and with which her only connection happens to be that they occurred on board her. (*Latus* v. *United States of America and Todd Shipyards Corp.*, 2d Cir., decided April 11, 1960, not yet officially reported.) In writing the opinion of the court in the *Latus* case, Judge Learned Hand said:

"The libelant's final position that, even if the United States was under no personal duty to use such reasonable care, in any event a liability *in rem* arose independently. There are, of course, such duties known to the maritime law, the best known of which is the liability of a ship for the negligence of a compulsory pilot, *The China*, 7 Wallace 53. It is also true that when a ship is on a 'bare-boat' charter, negligence of the crew 'appointed and paid by the charterers' will charge the ship *in rem*. *The Barnstable*, 181 U. S. 464. In the case at bar, Todd Shipyards was not such a charterer, or indeed a charterer at all. Like the owner's warranty of seaworthiness, an implied liability *in rem*, regardless of any personal duty of the owner, is a fiction, reaching far back into the early history of the law; and has been often quoted, 'a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong.' *The Eugene F. Moran*, 212 U. S. 466, 474. We can find no decision in which such a lien has been imposed on the ship for the fault of another person than the owner, when that fault is not that of a 'bare-boat' charterer, or of some specified class of person like a compulsory pilot. * * * *Grillea* v. *United States*, 232 F. 2d 919 (C. A. 2), merely held that a longshoreman might sue a ship *in rem*, if he was injured by her unseaworthiness, which no one denies."

It might be pointed out that the decision in *The China*, *supra*, on which the libelant so insistently relies, follows logically from the concept that the ship is an independent juristic person. The pilot in that case, though not an employee or agent of the owner of the vessel, was the agent of the vessel itself and his negligence in navigation rendered the vessel liable, independently of any liability on the part of its owner. And the *Grillea* decision, as Judge Hand points out, was based on the finding that the workman's injury resulted from the unseaworthiness of the vessel, and that he thus had a right *in rem* against the vessel, irrespective of whether the owner was personally responsible or not. (*The Osceola*, 189 U. S. 158, 171, 175; *Packing Co.* v. *Sandanger*, 259 U. S. 255, 259.)

Attempts to use the fiction of the maritime lien to obtain recovery outside of the presently established limits have not received judicial approval. It was said in *Samuels* v. *Munson S.S. Line*, 63 F. 2d 861, 862: "Collection of damages out of the ship is but indirect method of collecting damages from the owner or owners; for in case of unseaworthiness the owners would be personally liable for the full amount of the damages and in other cases they would be liable to the extent of their interest in the ship." And in *Smith* v. *The Mormacdale*, 198 F. 2d 849 (certiorari denied, 345 U. S. 908), it was said, at page 850: "We can draw upon the entire anthology of legal fiction in admiralty and nowhere find the vessel personified to the extent that it has been considered emancipated from its owner."

Cases cited by the libelant here, which deal with liens granted by statute to repairmen have no relevance. The libelant does not have, and does not claim, a statutory lien. What he claims is that he has a lien under the general maritime law. All relevant judicial decisions seem to be unanimous in holding that no such lien exists in the circumstances disclosed in this record. Further review by this Court, therefore, would not seem to be indicated.

CONCLUSION

The principles of law underlying the decision of the District Court and of the Court of Appeals are well established and uniformly recognized in all circuits. The Petition for the Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

GALLI, TERHUNE, GIBBONS & MULVEHILL,
Attorneys for Respondent-Impleaded.

PATRICK E. GIBBONS,
Of Counsel.

ACKERMAN PRESS, Phones BO 9-7107-8

No. 957 1101

Office Supreme Court, U.S.
JUN
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

KARL L. PEDERSEN,

Petitioner,

AGAINST

THE TANKER BULKLUBE, her engines, tackle appurtenance, etc.,

Respondent,

AGAINST

TODD SHIPYARDS CORPORATION,

Respondent Impleaded

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

VICTOR S. CICHANOWICZ,
Proctor for Respondent,
No. 26 Broadway,
New York, N. Y.

BYRON KING CALLAN,
PAUL M. JONES,
Of Counsel.

LODER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WORTH 2-0659

CASES CITED

PAGE

Alaska S. S. Co. v. Petterson, 347 U. S. 396 6

Antus v. Interocean S.S. Co., 6 Cir., 108 F. 2d 185 17

Baltimore & P. Steamboat Co. v. Norton, 284 U. S. 408 10

Bennett v. The Mormacteal, 254 F. 2d 138, cert. den. 358 U. S. 817 16

Berge v. National Bulk Carriers, Inc., 251 F. 2d 717, cert. denied 356 U. S. 958 ..... 4, 6, 14

Butler v. Whitman, 356 U. S. 271 17

Consumer's Import Co. v. Kabushiki K. K. Zosenjo, 320 U. S. 249 11

Crumady v. Joachim Hendrik Fisser, 358 U. S. 423 17

Desper v. Starved Rock Ferry Co., 342 U. S. 187 .. 17

DeZon v. American President Lines, 318 U. S. 660 9

Grillea v. United States, 232 F. 2d 919 15

Hawn v. America S.S. Co., 2 Cir., 107 F. 2d 999 .. 17

McAllister v. United States, 348 U. S. 19 17

Mississippi Horticultural Co. v. Pennsylvania R. Co., 320 U. S. 356 10

Mitchell v. Trawler Racer, Inc., —— U. S. —— (Decided May 16, 1960) 15, 17

Plamals v. Pinar Del Rio, 277 U. S. 151 11

Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U. S. 124 9

Samuels v. Munson S.S. Line, 5 Cir., 63 F. 2d 861 . 16

PAGE

Seas Shipping Co. v. Sieracki, 328 U. S. 85 9

Seneca Washed Gravel Corp. v. McManigal, 2 Cir., 65 F. 2d 779 17

Smith v. The Mormacdale, 3 Cir., 198 F. 2d 849 .. 16

Swanson v. Marra Bros., 328 U. S. 1 9

The Barnstable, 181 U. S. 464 ..... 14, 15

The China, 7 Wall 53 14

The Eugene F. Moran, 212 U. S. 466 17

The John G. Stevens, 170 U. S. 124 14

The Kate Cann, 2 Fed. 241, affirmed 8 Fed. 719 .... 13, 14

The Kongo, 6 Cir., 155 F. 2d 492, cert. denied 392 U. S. 735 15

The Lottowanna, 88 U. S. (21 Wall.) 558 10

The Max Morris, 137 U. S. 1 14

The Rock Island Bridge, 6 Wall (U. S.) 213 10

Turner v. United States, 27 F. 2d 134 ..... 14, 15

United N. Y. & N. J. S. H. Pilots Assoc. v. Halecki, 358 U. S. 613 ..... 6, 7

United States v. Brig Malek, et al., 43 U. S. 210 ... 14

West v. United States, 361 U. S. 118 ..... 6, 7, 17

STATUTES CITED

Title 28 U. S. C., Section 1254(1) 2

Revised Rules, Rule 19 2

Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. 901, et seq. 4, 5, 8, 9, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

KARL L. PEDERSEN,

Petitioner,

AGAINST

THE TANKER BULKLUBE, her engines, tackle appurtenance, etc.,

Respondent,

AGAINST

TODD SHIPYARDS CORPORATION,

Respondent Impleaded.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the United States District Court for the Eastern District of New York is officially reported at 170 F. Supp. 462. The *per curiam* opinion of the Court of Appeals for the Second Circuit affirming on the opinion of the District Court is not officially reported but appears at pages 13-14 of the petition.

Jurisdiction

It is not disputed that there is jurisdiction under Title 28 U. S. C., Section 1254(1). The petition however fails to specify why under the facts as have been found here, a writ should be granted, nor does it indicate that any genuine ground for the granting of a writ as set forth in Rule 19 of the Revised Rules of this Court exists in this case.

The Facts

Prior to June 22, 1952, National Bulk Carriers, Inc., as owner of the tank vessel *Bulklube*, decided to reconstruct her and rebuild her in accordance with the standards of the United States Coast Guard and the American Bureau of Shipping as a ship of general carriage. Accordingly, it made a contract with Todd Shipyards Corporation to take the vessel to Todds' own shipyard and rebuild her in accordance with approved plans and specifications. The work involved such extensive reconstruction that it amounted to a virtual rebuilding of the interior of the vessel. It required renewing her decks, burning out partitions and bulkheads which divided her into twenty-three tanks, making and installing new bulkheads and partitions, renewing the longitudinal and deck beams, reconditioning her engines, boilers, steering gear and all other machinery. The only parts of the vessel which were not removed and replaced were the shell of the ship and those members corresponding to the keel, including the keelson, the external structures of the vessel above the main deck, such as the bridge house, the bridge and the after housing.

In accordance with the contract National Bulk Carriers, Inc., as owner delivered the tanker *Bulklube* to Todd Shipyards Corporation on June 2, 1952 and Todd accepted such delivery. The master and crew were thereupon paid

off and none was thereafter maintained on the vessel until it was redelivered to National on December 19, 1952 when a new crew was engaged. During this period the only personnel of National Bulk Carriers who came on board were the former Chief Officer and National Bulk Carriers' Port Engineer who inspected the work when it was completed to see that it complied with the specification. They gave no orders and supervised none of the work. The former Chief Officer's working hours were from 8:00 a.m. to 5:00 p.m., five days a week. He signed no articles and was paid weekly the same as National's other shoreside employees. Sleeping quarters aboard ship were available for his convenience if he chose to use them. The Port Engineer on the other hand had no regular hours.

Under the contract Todd agreed to and in fact did provide all the necessary labor and material required for the completion of the work.

On August 8, 1952, on the date petitioner's accident occurred, about thirty to forty percent of the repair work under the contract had been completed. The engines of the tanker had been dismantled and were in the process of being repaired. The vessel could not steam under its own power. She was not fit to go to sea from the time she entered the Todd Shipyard, once active work was commenced on her, until it was completed.

With the vessel in this status and for the purpose of conducting the rebuilding work in which they had been engaged for some month and a half Todd's employees erected a staging by welding some metal brackets to the inside wall of one of the tanks and placing a plank across said brackets. National Bulk Carriers had no part whatsoever in construction of the staging or any of its component parts and had no knowledge or notice as to how the staging had been erected, or what its condition was, or

that it might be unsafe. In fact, there was no evidence in the case that National Bulk Carriers either had the occasion or the opportunity to observe or inspect the construction of the staging in question.

It appears that as the petitioner stepped on the staging one of the brackets supporting the staging collapsed and precipitated the petitioner to the bottom of the tank.

On the facts the court below found that the accident to the petitioner was due solely to the negligence of Todd in failing to properly construct the staging.

Petitioner however contended that even though the accident was caused by the negligence of his co-employees for which he could not sue his employer because his sole remedy against the employer was under the Longshoremen's & Harbor Workers Compensation Act, 33 U. S. C. 905 and giving due recognition to the decision of the court in *Berge* v. *National Bulk Carriers, Inc.*, 251 F. 2d 717, cert. denied 356 U. S. 958, that the warranty of seaworthiness did not extend to him he nonetheless could, by indirection, by resorting to an admiralty proceeding *in rem* against the vessel, obtain damages for his injuries.

In dismissing the libel the court below properly held that neither under the law nor under the facts could such a recovery be obtained. It concluded that under the law petitioner's accident created no maritime lien on the basis of which a recovery could be obtained *in rem*. It also found that under the law petitioner had no actionable right on the basis of which he could proceed either *in rem* or *in personam*. It further found as a fact that the vessel was not in navigation and that accordingly even if there might otherwise be a basis for a maritime lien, none could be enforced in this action.

It is respectfully submitted that both on the law and the facts the Court below was correct.

Questions Presented

1. Whether a harbor worker who is engaged in rebuilding a vessel and in the course thereof is injured solely through his employer's negligence and whose only recourse against such employer is limited to the remedy provided by the Longshoremen's & Harbor Worker's Compensation Act, 33 U. S. 901, *et seq.* can circumvent such legislative enactment and recover damages against the property of an innocent shipowner merely because the property proceeded against happens to be a ship which for some purposes has been considered a distinct juridical entity.

2. Whether a shipyard to whom a vessel has been delivered for the purpose of having its interior rebuilt can through its negligence subject the vessel of an innocent shipowner to liability *in rem* when such vessel is not in active marine operation and is not being employed in navigation as an instrument of commerce.

3. Whether a court's finding as a fact that a vessel which is in a shipyard and which is not fit to go to sea because only thirty to forty percent of the rebuilding work has been completed was not in navigation and therefore not subject to a maritime lien for the tort liability of the non-owner shipyard was proper and correct.

The Argument

There are no issues in the present case which warrant review by this Court, and no amount of straining of a fictional concept can convert it into such a case. The petition involves nothing more than a veiled attempt to circumvent the provisions of the Longshoremen's & Harbor Workers Compensation Act (33 U. S. C. A. 901

et seq.) and obtain for petitioner a right of recovery which Congress clearly withdrew from workers such as petitioner when, as here, they incur injuries in the course of their employer's work solely through the negligence of such employer. The fiction under which for some purposes a ship has been treated as a distinct juridical entity affords no legal basis for the creation of a new theory of liability which circumvents the clearly manifested intent of Congress and would accomplish, in an indirect way, what petitioner is prohibited from doing directly.

The proposed liability in no sense concerns a tort arising from a breach of warranty to provide a seaworthy vessel. No such claim has been made in this case in due recognition of the decision in *Berge* v. *National Bulk Carriers* Inc., 2 Cir. (1958) 251 F. 2d 717, cert. denied 356 U. S. 958 (1958), where it has been held that the particular rebuilding work on the *S S Bulklube* in which petitioner was engaged but at a different time was not work traditionally done by seamen. See *United N. Y. & N. J. S. H. Pilots Assoc.* v. *Halecki* (1959), 358 U. S. 613.

The proposed liability also does not involve a claim based on any negligence of the shipowner or those for whom it has been held responsible under the law. This theory of liability is not applicable where, as here, the vessel is delivered to a shipyard for rebuilding or extensive repairs and the shipowner exercises no control over the vessel and places and methods of work. *West* v. *United States*, 361 U. S. 118. This theory of liability as a basis for recovery is also not urged by petitioner now.

Moreover the proposed liability does not concern a tort resulting from a defect in a shoreside contractor's equipment which is brought on board a vessel in active marine operation as a substitute for standard ship's equipment such as was involved in *Alaska S.S. Co.* v. *Petterson*, 347

U. S. 396. Liability in that case arose from a breach of warranty of seaworthiness on a vessel in active marine operation where the shipowner was in control and the equipment involved was standard ship's equipment furnished by a shoreside contractor for ship's work rather than a contractor's special gear which was needed for work not traditionally done by the ship. Under the facts of this case, no question of shipowner's liability is involved here. *United N. Y. & N. J. S. H. Pilots Asso.* v. *Halecki*, 358 U. S. 613; *West* v. *United States*, 361 U. S. 118.

To focus attention on what type of liability is offered for determination by this Court, it may be pointed out that petitioner does not question that the tanker *Bulklube* was delivered to his employer, Todd, solely for the purpose of extensive repairs amounting to a virtual rebuilding of the interior of the vessel and that from the time active work was commenced on the vessel she was under Todd's control and not fit to go to sea until the work was completed. Nor does he question that at the time of his accident, only about thirty to forty per cent of the repair work under contract had been completed and that his accident was caused solely by the negligence of Todd in failing to properly construct a staging which was one of a series of such stagings that petitioner's fellow employees had erected in the vessel's tanks for use in rebuilding the interior of the vessel. It is likewise undisputed that the stagings and their supports, including those involved in petitioner's accident, were not standard ship's equipment; that the shipowner took no part in erecting these stagings or any of their component parts and had no knowledge or notice as to how they had been erected or what their condition was or whether they were safe on which to work or not.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
The Facts	2
Questions Presented	5
The Argument	5
POINT I.—Petitioner's remedy for injuries sustained through the fault of no one but his employer is limited to the Longshoremen's & Harbor Workers' Compensation Act	8
POINT II.—A proceeding in rem cannot create a right to recover damages where no such right is recognized or given under the law	10
POINT III.—Negligence by one who is in control of a vessel but not on board for the purpose of employing the vessel in navigation as an instrument of commerce and not using the vessel for that purpose creates no maritime lien	12
POINT IV.—The finding by the Trial Court that the vessel was not in navigation and therefore not the subject of a maritime lien is conclusive and cannot be disturbed	16
CONCLUSION	18

Under the facts established petitioner's claim does not in any sense involve a tort giving rise to any liability on the part of some third party be it a shipowner or his vessel. It concerns only petitioner's employer's liability and his responsibility therefor under the law. Such responsibility has been fixed by Congress and cannot be altered or extended by resorting to a convenient conceptual device such as a proceeding *in rem* the only object of which is, under appropriate circumstances, to carry a recognized right into effect and not to circumvent the law and thereby create a right which the law does not otherwise recognize. Petitioner is therefore relegated to his remedy under the Longshoremen's & Harbor Workers' Compensation Act (33 U. S. C. A. 901 *et seq.*) and no amount of strained semantics can confer any other right upon him.

On the facts and the law, therefore, the decision of the District Court was manifestly correct and the affirmance by the Court of Appeals was proper. There is no asserted conflict of decisions, nor in the light of the legislative history of the Longshoremen's & Harbor Workers Compensation Act (33 U. S. C. A. 901 *et seq.*) could any other result have been reached. Manifestly there is no special or important issues for review by this court.

POINT I

Petitioner's remedy for injuries sustained through the fault of no one but his employer is limited to the Longshoremen's & Harbor Workers' Compensation Act.

The only remedy which the law allows a harbor worker, such as the petitioner, when he sustains injuries in the course of his employment as the result of his employer's negligence is that provided by The Longshoremen's &

Harbor Workers' Compensation Act, 33 U. S. C. 901 *et seq.* In enacting this legislation, it was the purpose of Congress to give to harbor workers a substantial *quid pro quo* in the form of assured compensation as a substitute for their excluded claims which included the right to sue for an employer's negligence. *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U. S. 124, 129. These benefits constitute the limit of the employer's liability even where the harbor worker may be in the employ of the shipowner, or the one who may be lawfully in possession of the vessel in active marine operation. *Seas Shipping Co. v. Sieracki*, 1946, 328 U. S. 85, 102; *Swanson v. Marra Bros.*, 1946, 328 U. S. 1, 6. As was pointed out by this Court in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 102 and *Swanson v. Marra Bros.*, 328 U. S. 1, 6, the Act substituted its remedy for any right that might have existed in favor of a harbor worker to recover damages for the negligence of his employer. In this connection in *Swanson v. Marra Bros.*, 328 U. S. 1, 6, this Court said:

> "* * *. The liability of employers to pay the prescribed compensation is, by Sec. 905, made 'exclusive and in place of all other liability of such employer to the employee', his legal representative and any other person entitled to recover damages 'at law or in admiralty' from the employer for the injury or death. * * *."

The Longshoremen's & Harbor Worker's Compensation Act, 33 U. S. C. 901 *et seq.*, cannot be circumvented either by fictional concepts or by distinctions based upon such elements as the place of injury. *Swanson v. Marra Bros.*, 328 U. S. 1, 6-7. To circumvent the Act, as petitioner urges here, would as this Court pointed out in *DeZon v. American President Lines* (1943) 318 U. S. 660, 672, be contrary to its function. It is not this Court's province to

devise theories of liability which will circumvent the legislative will and enable the petitioner to by-pass the rights which the legislature deemed proper to fix. Even had this Court such power under certain circumstances, it could not circumvent the Compensation Act because it is affected with a public interest, *Baltimore & P. Steamboat Co. v. Norton*, 284 U. S. 408, 414; *Midstate Horticultural Co. v. Pennsylvania R. Co.*, 320 U. S. 356.

POINT II

A proceeding *in rem* cannot create a right to recover damages where no such right is recognized or given under the law.

In the absence of any legal right to sue for his employer's negligence, a proceeding *in rem* cannot create a right which does not otherwise exist. A proceeding *in rem* is not a mere matter of procedure, but requires a right in property such as a maritime lien before it can be properly invoked. *The Lottawanna*, 88 U. S. (21 Wall.) 558, 579, 581. The lien or right in property and the proceeding *in rem* are correlative and one is of no effect without the other. In this connection, in *The Rock Island Bridge*, 6 Wall (U. S.) 213, this court pointed out at page 215:

> "* * * The only object of the proceeding in rem is to make this right (maritime lien), where it exists, available to carry it into effect. It subserves no other purpose.
>
> "The lien and the proceeding in rem are therefore, correlative—where one exists, the other can be taken and not otherwise. * * *."

To be the subject of a proceeding *in rem* it is essential that the claim is one which gives rise to a maritime lien under the law. None can be implied as petitioner seeks to urge here. In *Plumals* v. *Pinar Del Rio*, 277 U. S. 151, 156, this Court pointed out that because maritime liens are *stricti juris*, they cannot be extended by construction, analogy or inference simply because under what might appear to be similar circumstances they may have been invoked. Certainly the fiction that for some purposes a vessel has been considered a distinct juridical entity affords no justification for subjecting a shipowner's property to a liability to which under no concept of law could the shipowner otherwise be subjected, purely because the property sought to be reached happens to be a ship. It violates the admonition of this Court in *The Eugene F. Moran*, 212 U. S. 466, when it said at page 474:

> "* * * But, after all, a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be extended. There is a practical line and a difference in degree between the case where the harm is done by the mismanagement of the offending vessel and that where it is done by the mismanagement of another vessel to which the immediate but innocent instrument of harm is attached (citing cases)."

It is also contrary to the holding of this Court in *Crowell's Import Co.* v. *Kabushiki K K. Zosen*, 320 U. S. 230, where, although a different statutory provision was involved, the same attempt was made to circumvent the statute by employing the fiction that a vessel be considered a distinct personality from its owner. This Court there said at page 233:

> "* * * To say that an owner is not liable, but that his vessel is liable, seems to us like talking in

> riddles.' The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age.''.

It therefore follows as a necessary legal consequence that since petitioner has no right cognizable under the law which allows him to recover for the negligence of his employer, no liability can be enforced against the vessel *in rem* even though his employer may have been in possession of the vessel at the time in question.

POINT III

Negligence by one who is in control of a vessel but not on board for the purpose of employing the vessel in navigation as an instrument of commerce and not using the vessel for that purpose creates no maritime lien.

The decision below in no sense narrows or constricts applicable decisions of this Court, is not in conflict with them in principle and is not in conflict with decisions of any of the Courts of Appeal. Each case referred to deals with a vessel in active marine operation and concerns torts or events occurring in connection with the employment of the vessel in navigation as an instrument in commerce. The opinion of the trial court is clear and logical and respondent adopts the reasoning of the Court on this point when it said:

> * * * Each of the cases upon which the libellant relies, e.g., The Barnstable, 181 U. S. 464, 21 S. Ct. 684 (1901); The John G. Stevens, 170 U. S. 113, 18 S. Ct. 544 (1889); The China, 7 Wall. 53, 19 L. Ed. 67 (1869), is concerned with the consequences flowing from the negligent operation of a vessel in navigation as an instrument of commerce. None

goes so far as to hold a vessel liable for injuries received by a workman engaged in work involving a virtual rebuilding of the whole interior of a vessel which has been temporarily withdrawn from navigation. In the absence of authority to do so, this court is not disposed to so hold. Cases such as The Owyhee, 60 F. 2d 641 (E. D. N. Y. 1932), affirmed 66 F. 2d 399 (2nd Cir. 1933), cited by the libellant, to the effect that there may be a lien for the unpaid balance of the agreed price of repairs upon a vessel which is being 'rebuilt' are not authority for the proposition that a vessel (382) itself is liable to a contractor's employee who is injured through the negligence of his fellow employees in the course of such rebuilding" (App., pp. 56a, 57a).

In fact in *The Kate Cann*, 2 Fed. 241, affirmed 8 Fed. 519, which is one of the cases which petitioner urges is in conflict with the decision below, the Court specifically noted that liability *in rem* for negligence could arise only out of the employment of the vessel in navigation as an instrument of commerce. It said at pages 244-245:

"Such a liability, in my opinion, exists where damage arises from the neglect on the part of the owner of a ship to discharge any duty arising on navigable waters out of the employment of the ship as an instrument of commerce, and owing to the person injured. If, then, it appears in this case that there was a duty owing to the libellant in respect to the manner of stowing the dunnage and plank that fell upon him, and it also appears that such duty arose out of the employment of the ship as an instrument of commerce, and to be performed on navigable waters, the jurisdiction of this court to condemn the ship, and the right of the libellant to

require that the ship be held to be charged with the damages caused to him by the omission of that duty, must be upheld."

Certainly in *The China*, 7 Wall 53, when the collision occurred the vessel was in navigation as an instrument of commerce and although it was under the command of a compulsory pilot, liability was visited upon the vessel because of the neglect of those who were in command of her navigation while she was engaged as an instrument of commerce.

An examination of the other cases such as *United States* v. *Brig Malek, et al*, 43 U. S. 210; *The Barnstable*, 181 U. S. 464; *The John G. Stevens*, 170 U. S. 124; *The Max Morris*, 137 U. S. 1; *The Kate Cann*, 2 F. 241, aff'd 8 F. 2d 134, shows that the tort or violation arose during the employment of the vessel in navigation as an instrument of commerce.

The fact that the vessel was in the control of the shipyard employer affords no basis for circumventing the Compensation Act. The employer's relationship was not the same as that of the charterer in *The Barnstable*, 181 U. S. 464 and *Turner* v. *United States*, 27 F. 2d 134, who took possession for the purpose of using the vessel in navigation as an instrument of commerce. Petitioner's employer on the other hand was in possession only so that he could rebuild the vessel at his shipyard and his only purpose for retaining such control was so that he could perform work aboard that traditionally was not and could not be done by seamen. *Berge* v. *National Bulk Carriers, Inc.*, 2 Cir., 251 F. 2d 717, cert. den. 356 U. S. 958.

The principles governing a shipyard's relationship to the vessel are clearly different from those of a charterer in possession and differ in the purpose for which each may

be in possession. The status and the relationship of a demise charterer such as was involved in *The Barnstable*, 181 U. S. 464 and *Turner* v. *United States*, 27 F. 2d 134, was defined in *The Kongo*, 6 Cir., 155 F. 2d 492, 495, cert. denied 392 U. S. 735, as follows:

> "* * * The contract let the whole of the vessel with a transfer to the Barge Lines of its entire command and possession and consequent control over its navigation. This amounted to a demise or lease of the vessel. Cf. United States v. Hvoslef, 237 U. S. 1, 16, 35 S. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286. In such case the charterer is a special owner (United States v. Shea, 152 U. S. 178, 189, 190, 14 S. Ct. 519, 38 L. Ed. 403), and is to be considered owner for the voyage and service stipulated. Reed v. United States, 11 Wall. 591, 600, 78 U. S. 591, 600, 20 L. Ed. 220; Leary v. United States, 14 Wall. 607, 610, 81 U. S. 607, 610, 20 L. Ed. 756 * * *."

Obviously such a demise of a vessel clearly gives rise to a different relationship than that which arises when a vessel is removed from navigation and turned over to a shipyard so that a shipyard can rebuild her. In fact, this Court only recently in *Mitchell* v. *Trawler Racer, Inc.*, U. S. : (Decided May 16, 1960), acknowledged that there was a clearly recognizable distinction between the rights of an employee injured on a vessel in active marine operation and those existing when the vessel was not so employed.

Grillea v. *United States*, 232 F. 2d 919, affords no basis under the facts for circumventing The Longshoremen's & Harbor Worker's Compensation Act, 33 U. S. C. 901, *et seq.* In the first place that case was concerned with a shipowner's liability for failing to furnish a seaworthy vessel,

which theory has no application to this case. Secondly the vessel at the time was not being rebuilt but was in active maring operation and the injured employee was aboard the vessel performing work traditionally done by the ship's crew. Furthermore, there was a specific agreement that the charterer employer would indemnify the owner against any lien arising out of the operation of the vessel by the charterer.

No such agreement existed in the present case. In view of this the trial court was constrained to and did follow the decision of the Court of Appeals for the Second Circuit in *Bennett* v. *The Mormacteal*, 254 F. 2d 138, cert. den. 358 U. S. 817, which was decided subsequent to Grillea. It held that in the absence of such agreement as is the case in the present action an employee could not sue his employer who was in control of the vessel, for negligence.

Obviously therefore the decision below is not in conflict with any decisions or principles defined by this Court nor with any decision in this circuit or any other circuit. See *Bennett* v. *The Mormacteal*, 2 Cir., 254 F. 2d 138, cert. den. 358 U. S. 817; *Smith* v. *The Mormacdale*, 3 Cir., 198 F. 2d 849; *Samuels* v. *Mason S.S. Line*, 5 Cir., 63 F. 2d 861.

POINT IV

The finding by the Trial Court that the vessel was not in navigation and therefore not the subject of a maritime lien is conclusive and cannot be disturbed.

The petition advocates a further fallacy that because a vessel may at the time be in the water it is in navigation and therefore the subject of a maritime lien regardless of what the actual status is and the purpose for which

it is being used at the time. It is clear from the decision of this Court in *West* v. *United States*, 361 U. S. 118, that the status of the vessel as well as the nature of the work which is being performed at the time are vital considerations in determining the question of a ship's liability, if any. These facts are also evident from this Court's comment in *Mitchell* v. *Trawler Racer, Inc.*, U. S. (Decided May 16, 1960).

While it is true that in *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, the vessel, which was held not to be in navigation, was in a drydock, that is not the determining factor in deciding whether a vessel is in navigation or not. It is obvious that when in the *Desper* case this Court cited the decisions in *Hawn* v. *America S.S. Co.*, 2 Cir., 107 F. 2d 999, 1000; *Seneca Washed Gravel Corp.* v. *McManigal*, 2 Cir., 65 F. 2d 779, 780 and *Antus* v. *Interocean S.S. Co.*, 6 Cir., 108 F. 2d 185, 187, where the vessels had been held not to be in navigation though in the water, in support of its holding, that mere presence in the water did not confer on a ship the status or obligations of a vessel which is in navigation and being used as an instrument of commerce.

A vessel in such a status is incapable of giving rise to a maritime lien and when a court finds as a fact that the vessel is withdrawn from navigation, such finding cannot be ignored or disturbed unless it is clearly erroneous. The issue as to whether a ship is in navigation or not is one of fact and not a matter of law. *Butler* v. *Whitman*, 356 U. S. 271. Since petitioner has failed to show that such finding was clearly erroneous it cannot be disturbed. *McAllister* v. *United States*, 348 U. S., 19, 22-23; *Cramady* v. *Joachim Hendrik Fisser*, 358 U. S. 423, 428.

What may have been the vessel's status before she was delivered to the shipyard or after she was redelivered

to the respondent-claimant is of no significance. At the time of petitioner's accident the rebuilding was only thirty to forty percent completed and that is what determines the status of the vessel and the fact that she was not in navigation and therefore insofar as tort liability is concerned, she could not be the subject of a maritime lien.

CONCLUSION

The decision of the Court below is therefore correct and presents no conflict of decisions nor any important issues for determination by this Court and the petition should accordingly be dismissed.

Respectfully submitted,

VICTOR S. CICHANOWICZ,
Proctor for Respondent.

BYRON KING CALLAN,
PAUL M. JONES,
Of Counsel.